

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2022

To be argued by
PETER A. CLARK

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-2022

THOMAS JOSEPH HERRMANN,
Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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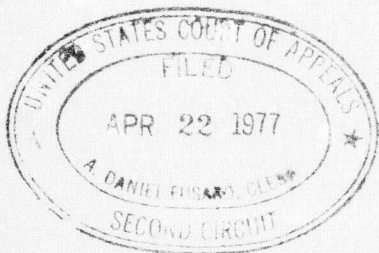


TABLE OF CONTENTS

	PAGE
Statutes Involved	iii
Questions Presented	1
Statement of the Case	2
Statement of Facts	2
ARGUMENT:	
I. Appellant's guilty plea was voluntarily and knowingly made, and was not induced by misleading representations or promises by the prosecutor	4
II. The District Court had no obligation under Rule 11, FRCP, to advise Appellant after his guilty plea and upon his request for transfer to state custody, of the impact of Title 18, United States Code, Section 3568 upon his eligibility for concurrent sentencing	6
III. There being no error in the entry of Appellant's guilty plea, the ends of justice do not require that Appellant be resentenced	7
CONCLUSION	8

TABLE OF AUTHORITIES

	PAGE
<i>Correale v. United States</i> , 479 F.2d 944 (1st Cir. 1973)	8
<i>Harris v. United States</i> , 493 F.2d 1213 (8th Cir.), cert. denied, 417 U.S. 949 (1974)	7
<i>Hermann v. United States</i> , 524 F.2d 1103 (2d Cir. 1975)	2, 6
<i>Michel v. United States</i> , 507 F.2d 461 (2d Cir. 1974), cert. denied, 422 U.S. 1009 (1975)	7
<i>Redway v. Walker</i> , 132 Conn. 300, 43 A.2d 748 (1945)	5
<i>Tindall v. United States</i> , 469 F.2d 92 (5th Cir. 1972)	7
<i>United States v. Myers</i> , 451 F.2d 402 (9th Cir. 1972)	7
<i>Wall v. United States</i> , 500 F.2d 38 (10th Cir.), cert. denied, 419 U.S. 1025 (1974)	7
<i>Williams v. United States</i> , 500 F.2d 42 (10th Cir. 1974)	7
<i>Zerbst v. Lyman</i> , 255 F. 609 (5th Cir. 1919)	5
<i>Zovluck v. United States</i> , 448 F.2d 339 (2d Cir. 1971), cert. denied, 405 U.S. 1043 (1972)	4

Statutes Involved

Rule 11, Federal Rules of Criminal Procedure:

(a) *Alternatives*. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) *Nolo Contendere*. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) *Advice to Defendant*. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so

that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) *Insuring That the Plea is Voluntary.* The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney. . . .

Title 18, United States Code, Section 3568:

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary. . . . for service of such sentence

Title 18, United States Code, Section 4082:

(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise

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Docket No. 77-2022

THOMAS JOSEPH HERRMANN,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Questions Presented

- I. Whether Appellant's guilty plea was induced by misleading representations and agreements made by the prosecutor.
- II. Whether the District Court erred by not advising Appellant that his post-plea request for transfer to state custody so that he could begin service of a state sentence would result in his being eligible for concurrent sentencing only if the Court recommended that the Attorney General designate the state institution as the place of service of his Federal sentence.
- III. Whether, under the circumstances of this case, the ends of justice require Appellant to be resentenced.

Statement of the Case

This is an appeal from a judgment of the District Court (Clarie, C.J.) denying Appellant Herrmann's motion made pursuant to Title 28, United States Code, Section 2255 to vacate a conviction of bank robbery or in the alternative resentence. Herrmann plead guilty to a violation of Title 18, United States Code, Section 2113(a) on May 13, 1971, and was sentenced on September 27, 1971, to a term of eleven years, consecutive to a term he was then serving in state custody. On October 28, 1974, he filed a motion to vacate in the District Court alleging grounds different than those specified herein, which motion was denied on January 3, 1975. In his appeal from denial of that motion he raised for the first time the claim that the District Court failed to comply with Rule 11, FRCP, when accepting his plea. The District Court's denial of the previous motion was affirmed in an opinion which commented on that issue but did not rule on it directly since it was raised for the first time on appeal. *Herrmann v. United States*, 524 F.2d 1103 (2d Cir. 1975).

The instant motion was thereafter filed on September 8, 1976, a hearing was held on November 22, 1976, and the motion was denied in a memorandum filed January 20, 1977. This appeal followed.

Statement of Facts

On October 29, 1970, Appellant and one George Buchanan were indicted for the August 14, 1970 armed robbery of a bank in Georgetown, Connecticut. Buchanan entered a guilty plea to one count of the indictment (Title 18, United States Code, Section 2113(a)) on May 11, 1971 and was sentenced on July 26, 1971 (Zampano,

J.) to a term of eleven years. Appellant, while being held as a federal prisoner in lieu of bond, appeared in state court pursuant to writ on May 6, 1971 and entered a guilty plea to unrelated state charges. He was immediately sentenced to a five to seven year term in state's prison, and was returned to Federal custody that day. He thereafter entered a guilty plea in the District Court (Clarie, C.J.) on May 13, 1971, to the same bank robbery count as his co-defendant Buchanan. Immediately after the plea his attorney advised the Court of the intervening state plea and sentence and then requested that Appellant's bond be reduced so that he could be released to the state to begin service of the state sentence, which motion was granted. He was returned to Federal Court for sentencing on September 27, 1971, at which time he received an eleven year term specified to be consecutive to the state sentence he was then serving.

At the hearing on November 22, 1976, Appellant testified that he asked to be transferred to state custody after his guilty plea in Federal Court in the belief that this would make him eligible for concurrent sentencing (App. 21a, 22a), which belief was based on advice from his own attorney and the Assistant United States Attorney. He specifically stated that the prosecutor did not promise him that the sentence *would* be concurrent, or its length (App. 23a, 24a), and acknowledged he was fully aware he could have received a sentence of up to twenty years consecutive to the state sentence (App. 30a).

Appellant's attorney, Eugene Spear, testified that he advised Herrmann that he would be eligible for concurrent sentencing if he transferred to state custody after his plea. (App. 45a). Mr. Spear stated that the basis of his advice was the provision whereby a federal sentence could be made effectively concurrent with a state sentence if the sentencing Judge recommended to

the Attorney General that the state institution be designated as the place of service of the Federal sentence. (App. 48a).

The Assistant United States Attorney then made a representation, the oath being waived by Appellant, regarding the advice he gave Appellant and his counsel. He stated that he advised Appellant that the Federal sentence could be effectively concurrent if the Court recommended to the Attorney General that the state institution be designated as the place of service of the Federal sentence, and further that he agreed he would not object if Appellant requested the Court to do this, but that no commitment was made that a specific sentence would be imposed. (App. 53a).

ARGUMENT

I.

Appellant's guilty plea was voluntarily and knowingly made, and was not induced by misleading representations or promises by the prosecutor.

Appellant asserts that faulty pre-plea advice from the prosecutor caused him to take post-plea action, *i.e.* requesting a transfer to state custody, that resulted in his becoming ineligible for concurrent sentencing. He concludes, therefore, that the plea itself was involuntary because induced by misleading representations and should be set aside. After an evidentiary hearing the District Court rejected this contention, finding that the plea was made with knowledge of its consequences and that Appellant was not misled by the prosecutor. These findings should be disturbed only if clearly erroneous. *Zovluck v. United States*, 448 F.2d 339 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

Even if Appellant's assertion is true that had he remained in Federal custody the state sentence would automatically be concurrent with the Federal sentence,¹ that would be true only insofar as the state is concerned. His conclusion that he would have escaped consecutive sentencing by the simple expedient of remaining in Federal custody blithely ignores the fact that the District Court still could and would have made the second Federal sentence consecutive regardless of how the state administratively treated its sentence. The District Court's sentencing prerogative could not be hamstrung in so facile a manner as Appellant suggests.

Nevertheless, despite Appellant's speculation about what might have occurred had he made a different tactical decision, the real focus of the inquiry is whether he was induced to do so by erroneous advice from the prosecutor. Both the prosecutor and his own attorney made clear at the hearing that he was advised that his eligibility for effective concurrent sentencing, by virtue of designating the state institution as the place of service of the Federal sentence, was contingent upon such a recommendation from the sentencing Judge. It was equally well known to Herrmann that such a recommendation may not be forthcoming. The advice Appellant received was an accurate reaction of the appropriate law, as set forth in Title 18, United States Code, Sections 4082 and 3568. Under those circumstances there was nothing to suggest to Herrmann that he had been promised some type of leniency, the reliance on which would strip his plea of its voluntary character. Herr-

¹ Appellant relies on *Redway v. Walker*, 132 Conn. 300, 43 A.2d 748 (1945) and *Zerbst v. Lyman*, 255 F.609 (5th Cir. 1919) for this proposition. Neither case deals with sentences by separate sovereigns. *Redway*, in fact, clearly speaks only in terms of two Connecticut state sentences to the same institution.

mann knew full well what he was exposed to. That he is disappointed with the result is insufficient to justify vacation of his plea.

II.

The District Court had no obligation under Rule 11, FRCP, to advise Appellant after his guilty plea and upon his request for transfer to state custody, of the impact of Title 18, United States Code, Section 3568 upon his eligibility for concurrent sentencing.

Subsequent to Appellant's plea, he moved to be released to state custody to begin service of his state sentence in the hopes that he would increase his chances for concurrent sentencing. The practical effect of this transfer was to make him subject to the provisions of Title 18, United States Code, Section 3568, whereby his Federal sentence would not commence to run until his release from state custody if the state institution was not designated by the Attorney General as the place of confinement for the Federal sentence.

Although arguably this set of facts is not a Rule 11 problem at all, since the action triggering the alleged obligation on the Court to advise him of Title 18, United States Code, Section 3568 took place after the plea, the situation does lend itself to a Rule 11 analysis since it all occurred at Appellant's single appearance before the Court for plea. Conceding that, the Court was nonetheless under no obligation to so advise him. In the decision on Herrmann's previous appeal, this Court rather clearly forecast its treatment of the issue if properly reached, as it is now. In dicta, the Court perceived no error in the District Court's lack of advice concerning Title 18, United States Code, Section 3568. *United States v. Herrmann*, 524 F.2d 1103, 1104 (2d Cir. 1975).

Cf. Tindall v. United States, 469 F.2d 92 (5th Cir. 1972); *Harris v. United States*, 493 F.2d 1213, 1214 (8th Cir.), *cert. denied*, 417 U.S. 949 (1974); *Williams v. United States*, 500 F.2d 42 (10th Cir. 1974); *Wall v. United States*, 500 F.2d 38 (10th Cir.), *cert. denied*, 419 U.S. 1025 (1974).

Appellant's chief reliance on *United States v. Myers*, 451 F.2d 402 (9th Cir. 1972) for that proposition that the Court was required to advise Appellant of the mechanics of the statute is hopelessly misplaced, this Court already having distinguished *Myers* from the case at bar. *United States v. Hermann*, *supra* at 1104. The impact of Title 18, United States Code, Section 3568 is simply not one of the direct consequences of the plea which the Court was required by Rule 11 FRCP to enumerate, especially in view of the unanticipated request here for transfer of custody after entry of the plea. *Cf. Michel v. United States*, 507 F.2d 461 (2d Cir. 1974), *cert. denied*, 422 U.S. 1009 (1975). There being no breach of Rule 11, FRCP, the plea is not vacatable on those grounds.

III.

There being no error in the entry of Appellant's guilty plea, the ends of justice do not require that Appellant be resentenced.

Appellant seeks as an alternative to vacation of his plea and conviction an order directing that his sentence be vacated and that he be resentenced to a short term. He asserts that even if there are no errors requiring vacation of the conviction resentencing is necessary to correct the injustice flowing from his lost opportunity to frustrate the intentions of the sentencing Court. While it is possible to correct injustices, such as an unfulfilled

plea bargain, *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973), this is hardly the case that calls for the remedy. Aside from the fact that the reasons Appellant cites for use of the remedy are simply a rehash of what he concedes for the sake of argument do not constitute error, the argument ignores the fact that it was the District Court's stated and repeated intention that the seriousness of the crime and Appellant's prison record called for *consecutive* sentencing. Appellant was not a hapless victim of a quirk in the law. The Court, after careful consideration of all the factors, specified that Appellant should receive a consecutive sentence, which Appellant well knew was a distinct possibility when he entered his plea. The ends of justice certainly do not now require that the intent of the District Court be frustrated by directing that the original and appropriate sentence be discounted.

CONCLUSION

For the foregoing reasons, Appellant's guilty plea was knowingly made with full knowledge of the consequences required by Rule 11, Federal Rules of Criminal Procedure to be made known to him, his sentence was fair and just, and the District Court properly denied his motion to vacate made pursuant to Title 28, United States Code, Section 2255.

Respectfully submitted,

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No. 77-2022

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U S A,
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AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York

That on the 21st day of April, 1977, deponent served the within Brief upon Stephen Wizner, Esq., Yale Legal Services, 127 Wall Street, New Haven, Connecticut 06520

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 21st day of April 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1979